# CERTIFIED FOR PARTIAL PUBLICATION\*

## IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## SECOND APPELLATE DISTRICT

### **DIVISION FIVE**

MAGDA BENAVIDES,

Plaintiff and Appellant,

v.

STATE FARM GENERAL INSURANCE COMPANY,

Defendant and Appellant;

LISA HALEY,

Defendant and Respondent.

B179028

(Los Angeles County Super. Ct. No. SC073073)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry B. Friedman, Judge. Affirmed in part and reversed in part.

Cohen & Lord, Scott Richard Lord and James F. Boyle for Plaintiff and Appellant.
Horvitz & Levy, Mitchell C. Tilner, S. Thomas Todd; Sedgwick, Detert, Moran &
Arnold and Maria Louise Cousineau for Defendant and Appellant State Farm General
Insurance Company.

<sup>\*</sup> Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III C and III D.

Law Office of Lloyd C. Ownbey, Jr. and Lloyd C. Ownbey, Jr. for Defendant and Respondent Lisa Haley.

### I. INTRODUCTION

Before us are appeals from the judgment entered after a jury trial in an action based on the presence of mold in condominium units in Santa Monica instituted by plaintiff, Magda Benavides. Although she prevailed on her negligent investigation claim, plaintiff appeals from the judgment against her insurer, defendant State Farm General Insurance Company (State Farm). Plaintiff argues that she is entitled to a new trial on her claims for contract breach and violation of the implied covenant of good faith and fair dealing against State Farm. Plaintiff does not argue she is entitled to a new trial on her negligent investigation claim on which she prevailed during the jury trial. But, State Farm appeals from the judgment in favor of plaintiff on her negligent investigation claim. Plaintiff also appeals from a judgment in favor of defendant, Lisa Haley. Ms. Haley's condominium was upstairs from plaintiff's unit.

In the published portion of this opinion, we discuss whether plaintiff may recover for negligent handling of her claim despite the fact there is no coverage under the terms of her policy. As will be noted, we conclude plaintiff may not recover for the negligent handling of her claim because there is no coverage under the terms of the policy. Further, none of the circumstances which allows for a contract claim to be pursued as a tort cause of action are present. Hence, we reverse plaintiff's judgment against State Farm for negligent investigation. We affirm the judgment in all other respects.

### II. BACKGROUND

Plaintiff purchased a ground floor condominium unit in Santa Monica in 1994. In 2001, mold was found in the exterior walls of the property, including walls adjacent to plaintiff's unit. Subsequent testing revealed mold inside plaintiff's condominium.

Plaintiff was advised by a physician to move out of her condominium. Plaintiff submitted a claim for additional living expense to State Farm, which hired a civil engineer to investigate. State Farm later denied plaintiff's claim on grounds the mold was an excluded loss which was not caused by a covered peril. Plaintiff sued State Farm and Ms. Haley. Plaintiff alleged State Farm had failed to properly investigate her claim, resulting in an erroneous coverage decision. The jury found there was no coverage and no breach of the insurance contract. However, the jury also found State Farm negligently investigated plaintiff's claim, causing her \$260,000 in damages.

Ms. Haley lived upstairs from plaintiff. The complaint alleged that in May 2000, during remodeling, Ms. Haley's contractor caused water to leak into plaintiff's kitchen and living room. At trial, plaintiff presented evidence of other leaks from Ms. Haley's unit. The jury found Ms. Haley was not negligent with regard to water intrusion into plaintiff's unit.

## III. DISCUSSION

## A. The Policy And the Jury Findings

The State Farm insurance policy issued to plaintiff excluded mold unless a covered peril was the predominant cause of the mold. Plaintiff's additional living expense claim fell within "Coverage C – Loss of Use." That provision stated in part: "Additional Living Expense. When a Loss Insured causes the residence premises to become uninhabitable, we will cover the necessary increase in cost you incur to maintain your standard of living for up to 24 months." "Losses Insured" included "Coverage A – Building Property." Coverage A provided: "We cover: [¶] 1. alterations, appliances, fixtures and improvements which are part of the building contained within your unit; [¶] 2. items of real property which pertain exclusively to your unit; or [¶] 3. property which is your insurance responsibility under the governing rules of the condominium. . .

..." (Emphasis omitted.) In "Section I – Losses Insured," the policy stated: "We insure for accidental direct physical loss to the property described in Coverage A [building property] . . . , except as provided in SECTION I – LOSSES NOT INSURED." "Section I – Losses Not Insured" stated in relevant part: "1. We do not insure under any coverage for any loss consisting of the items in paragraphs 2., 3., 4. or 5. below. This exclusion does not apply if the loss is caused by a peril which is not otherwise excluded.  $[\P]$  2. We do not insure for any loss to the property described in Coverage A [building property]... which is caused by one or more of the items below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:  $[\P]$  ...  $[\P]$  f. continuous or repeated seepage or leakage of water . . . from a:  $[\P]$  . . .  $[\P]$  (2) household appliance; or  $[\P]$  (3) plumbing system, including from, within or around any shower stall, shower bath, tub installation, or other plumbing fixture, including their walls, ceilings or floors; [¶] which occurs over a period of time. . . .; [¶] g. wear, tear, marring, scratching, deterioration, inherent vice, latent defect or mechanical breakdown; [¶] h. corrosion, electrolysis or rust; [¶] i. Mold, fungus or wet or dry rot; [¶] j. contamination;  $[\P]$  ...  $[\P]$  4. We do not insure under any coverage for any loss which is caused by one or more of the items below, regardless of whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: [¶] ... [¶] c. Water Damage, meaning:  $[\P]$  (1) . . . surface water . . . ;  $[\P]$  . . .  $[\P]$  5. We do not insure for loss described in paragraphs 2., 3. and 4. immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss: [¶]  $\dots$  [¶] b. defect, weakness, inadequacy, fault or unsoundness in: [¶]  $\dots$  [¶] (2) design, specifications, workmanship, construction, grading, compaction; [¶] (3) materials used in construction or repair; or  $[\P]$  (4) maintenance;  $[\P]$  of any property (including land, structures, or improvements or any kind) whether on or off the residence premises;

or [¶] c. weather conditions. [¶] However, we do insure for any resulting loss from items a., b. and c. unless the resulting loss is itself a Loss Not Insured by this Section."

With respect to building property coverage, the insurance policy at issue was a first party "all-risk" policy. (Garvey v. State Farm Fire & Casualty Co. (1989) 48 Cal.3d 395, 399; Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2005) ¶ 6:250.1, p. 6B-24 (rev. #1, 2005).) (The parties do not discuss and we do not consider the policy provisions relating to personal property loss.) An all-risk policy covers risks of physical loss except those excluded under the terms of the insuring contract. Under an all-risk policy, the limits of coverage are defined by the exclusions. (Garvey v. State Farm Fire & Casualty Co., supra, 48 Cal.3d at p. 406; Nissel v. Certain Underwriters at Lloyd's of London (1998) 62 Cal. App. 4th 1103, 1114.) If an excluded risk is the "efficient proximate" or predominant cause of the loss, there is no coverage. (Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, 761; Garvey v. State Farm Fire & Cas. Co., supra, 48 Cal.3d at pp. 402-403.) Stated conversely, if the predominate cause of loss is a covered risk, the insured's claim with be covered, even if a non-insured peril contributed to the injury. (Julian v. Hartford Underwriters Ins. Co., supra, 35 Cal.4th at p. 754; State Farm Fire & Cas. Co. v. Von der Lieth (1991) 54 Cal.3d 1123, 1131.)

The Supreme Court has held that when sufficient evidence is introduced to support the possibility that a plaintiff's damages were caused by both included and excluded risks, "Coverage should be determined by a jury under an efficient proximate cause analysis." (Garvey v. State Farm Fire & Casualty Co., supra, 48 Cal.3d at p. 412; accord, State Farm Fire & Cas. Co. v. Von der Lieth, supra, 54 Cal.3d at p. 1131.) In Garvey, for example, there was conflicting evidence as to the causes of damage to the plaintiff's residence. Earth movement was an excluded peril. Contractor negligence was a covered risk. The Supreme Court held: "If the earth movement was the efficient proximate cause of the loss, then coverage would be denied . . . . On the other hand, if negligence was the efficient proximate cause of the loss, then coverage exists . . . . These

issues were jury questions because sufficient evidence was introduced to support both possibilities." (*Garvey v. State Farm Fire & Casualty Co., supra,* 48 Cal.3d at pp. 412-413.)

It is undisputed plaintiff's condominium unit owners policy excluded coverage for mold. But an exception to the mold exclusion arose under the following policy language found in "Section I – Losses Not Insured": "We do not insure under any coverage for any [losses not insured]. *This exclusion does not apply if the loss is caused by a peril which is not otherwise excluded.*" (Italics added.) A State Farm claims representative, Julie Lynn Nisbet, testified at trial the foregoing clause meant, "[I]f the cause of the mold is not otherwise excluded, then [State Farm] could provide coverage for the mold." Stated differently, she testified: "Mold is an excluded peril. However, if the predominant cause is covered, this paragraph gives that coverage back."

The jury found by an 11 to 1 margin that Sate Farm performed all of its contractual duties under the policy it issued to plaintiff. Further, the jury found by a 10 to 2 margin that the "Haley water event in May 2000" was not the predominant cause of the mold in plaintiff's unit. As noted, mold is a non-covered injury. But the evidence was subject to the interpretation that the May 2000 water leakage from Ms. Haley's unit was of the type that it *could* be a covered event; i.e. the leakage was a predominate cause of plaintiff's loss. Hence, that potentiality was presented to the jury. And the jury found a preponderance of the evidence demonstrated that the May 2000 water leakage from Ms. Haley's unit, which was immediately remediated, was not a predominate cause of plaintiff's injuries. Plaintiff does not contend that substantial evidence does not support the jurors' findings in this regard. Nor does plaintiff argue that the trial court committed evidentiary error in any respect. Hence, these issues have been forfeited. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 70, disapproved on another point in *Bailey v. County of Los Angeles* (1956) 46 Cal.2d 132, 139.) Therefore, in the absence of a loss

covered by the policy, we are confronted with the question of whether plaintiff may recover for negligent failure to investigate her claim.

# B. There Was No Tort Liability In This Case For Negligent Investigation Of A First Party Insurance Claim Absent Coverage

We turn to the question whether, absent coverage, State Farm can be held liable in tort for negligently investigating plaintiff's insurance claim. The jury found State Farm negligently investigated plaintiff's claim causing her \$260,000 in damages. We conclude there was no tort liability on State Farm's part for negligent investigation of plaintiff's first party insurance claim.

The relationship between insured and insurer is contractual. Nevertheless, it is well-established that tort liability will lie against an insurer for breach of the implied covenant of good faith and fair dealing. (Frommoethelydo v. Fire Ins. Exchange (1986) 42 Cal.3d 208, 214; Silberg v. California Life Ins. Co. (1974) 11 Cal.3d 452, 461; Gruenberg v. Aetna Life Ins. Co. (1973) 9 Cal.3d 566, 575; see Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal.4th 390, 402.) The implied covenant arises from the contract. (Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 35-36; Tran v. Farmers Group, Inc. (2002) 104 Cal. App. 4th 1202, 1216-1217.) The Supreme Court has held: "In addition to the duties imposed on the contracting parties by the express terms of their [insuring] agreement, the law implies in every contract a covenant of good faith and fair dealing. (Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 658; see also Comment, Extending the Insurer's Duty of Good Faith and Fair Dealing to Third Parties Under Liability Insurance Policies (1978) 25 UCLA L.Rev. 1413, 1418-1424.) The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement. (Murphy v. Allstate Ins. Co. (1976) 17 Cal.3d 937, 940; Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 429; Comunale v. Traders & General Ins. Co., supra, 50 Cal.2d at p. 658.)"

(Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 818; Love v. Fire Ins. Exchange (1990) 221 Cal.App.3d 1136, 1153.)

The Supreme Court has held, "The precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes." (Egan v. Mutual of Omaha Ins. Co., supra, 24 Cal.3d at p. 818; see Jonathan Neil & Associates, Inc. v. Jones (2004) 33 Cal.4th 917, 937.) In the first party insurance context, the insured's primary contractual right is to receive benefits due under the policy. (CalFarm Ins. Co. v. Krusiewicz (2005) 131 Cal. App. 4th 273, 285-286; Love v. Fire Ins. Exchange, supra, 221 Cal.App.3d at p. 1153.) Tort liability for an insurer's breach of the implied covenant of good faith and fair dealing arises when the insurer unreasonably and in bad faith withholds payment of the insured's claim. (Frommoethelydo v. Fire Ins. Exchange, supra, 42 Cal.3d at pp. 214-215; Love v. Fire Ins. Exchange, supra, 221 Cal.App.3d at p. 1151.) The Supreme Court has held: "When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.' (Gruenberg [v. Aetna Ins. Co., supra, 9 Cal.3d at p. 575]; accord, Silberg [v. California Life Ins. Co., supra, 11 Cal.3d at p. 461]; Fletcher[v. Western National Life Ins. Co. (1970) 10 Cal.App.3d 376, 401-402].) For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it . . . must give at least as much consideration to the latter's interests as it does to its own. (Silberg[ v. California Life Ins. Co., supra, 11 Cal.3d at p. 460]." (Egan v. Mutual of Omaha Ins. Co., supra, 24 Cal.3d at pp. 818-819.) The Supreme Court has further explained, "[A]n insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial. (Egan v. Mutual of Omaha Ins. Co.[, supra,] 24 Cal.3d [at pp.] 818-819.)" (Frommoethelydo v. Fire Ins. Exchange, supra, 42 Cal.3d at p. 215.) When an insurer withholds benefits for proper cause, however, there is no breach of the implied covenant. (Love v. Fire Ins. Exchange, supra, 121 Cal.App.3d at p. 1151; California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App.3d 1, 54-55.) This is because, as the Court of Appeal held in *California Shoppers, Inc.*:

"[D]eclining to perform a contractual duty under the policy with proper cause is not a breach of the implied covenant. (See Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, 770[, overruled in Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal.4th 85, 87-88].)" (California Shoppers, Inc. v. Royal Globe Ins. Co., supra, 175 Cal.App.3d at p. 54, original italics.) Thus, to establish an implied covenant tortious breach, an insured must show first, that benefits were due under the policy, and second, that the benefits were withheld without proper cause. (Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 278; Love v. Fire Ins. Exchange, supra, 221 Cal.App.3d at p. 1151.)

It follows an insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. (Waller v. Truck Ins. Exchange, Inc., supra, 11 Cal.4th at pp. 35-36 [no potential coverage hence no duty to defend]; McMillin Scripps North Partnership v. Royal Ins. Co. (1993) 19 Cal.App.4th 1215, 1222; Love v. Fire Ins. Exchange, supra, 221 Cal.App.3d at p. 1153; Murray v. State Farm Fire & Casualty Co. (1990) 219 Cal.App.3d 58, 66; Brodkin v. State Farm Fire & Casualty Co. (1989) 217 Cal.App.3d 210, 218; see Kopczynski v. Prudential Ins. Co. (1985) 164 Cal.App.3d 846, 849.) If the insurer's investigation—adequate or not—results in a correct conclusion of no coverage, no tort liability arises for breach of the implied convenant. (Murray v. State Farm Fire & Casualty Co., supra, 219 Cal.App.3d at p. 66; Brodkin v. State Farm Fire & Casualty Co., supra, 217 Cal.App.3d at p. 218; Kopczynski v. Prudential Ins. Co., supra, 164 Cal.App.3d at p. 849.)

The cause of action at issue is not breach of the implied covenant of good faith and fair dealing, but *negligence*. The question arises, therefore, whether, in the absence of benefits due under the insuring contract, plaintiff can recover for State Farm's *negligent* investigation of her claim. We conclude in this case that absent coverage, there is no tort liability for improperly investigating a first-party insurance claim whether the insurer's conduct is characterized as an implied covenant breach or negligence. The same logic that precludes imposition of damages for breach of the implied covenant in

the absence of coverage in this case also rules out recovery for negligence. The relationship between the parties is contractual. The insured's primary right is to receive compensation for covered losses. The insurer's duty is not to unreasonably withhold the payment of benefits due. When, as here, no benefits are due, a negligent investigation does not frustrate the insured's right to the benefits of the contract. The insured who is not entitled to insurance proceeds has suffered no injury as a result of the manner in which the insurer's investigation was conducted. The Court of Appeal's conclusion in *Murray v. State Farm Fire & Casualty Co., supra,* 219 Cal.App.3d at pages 65-66, with regard to a breach of the implied covenant claim is equally applicable to a negligence cause of action: "Whatever the merits [of the] assertion [of inadequate investigation], the fact that the investigation yielded a correct [no coverage] conclusion precludes any claim that the inadequacy caused any damage." (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880; *Brodkin v. State Farm Fire & Casualty Co., supra,* 217 Cal.App.3d at p. 218.)

Also, the California Supreme Court has identified the limited circumstances where the litigants' relationship, which has its basis in a contract, can give rise to a tort claim. In *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990, the Supreme Court synthesized the relevant test for allowing a contract based claim to be pursued as a tort cause of action: "Generally, outside the insurance context, "a tortious breach of contract . . . may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." [Citation.] Focusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated. [Citation.] If every negligent breach of a contract gives rise to tort damages the

limitation would be meaningless, as would the statutory distinction between tort and contract remedies.' (*Erlich v. Menezes* [(1999)] 21 Cal.4th [543,] 553-554.)"

In *Robinson Helicopter*, the Supreme Court recited its prior holding in *Erlich* thusly: "In *Erlich*, . . . , we held that a party's contractual obligation may create a legal duty and that a breach of that duty may support a tort action. We stated, '[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. [Citation.]' (*Ibid.*) [¶] We went on to describe several instances where tort damages were permitted in contract cases. 'Tort damages have been permitted in contract cases where a breach of duty directly causes physical injury [citation]; for breach of the covenant of good faith and fair dealing in insurance contracts [citation]; for wrongful discharge in violation of fundamental public policy [citation]; or where the contract was fraudulently induced. [citation.]' '[I]n each of these cases, the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm. [Citation.]' [Citations.]" (*Robinson Helicopter Co., Inc. v. Dana Corp., supra*, 34 Cal.4th at pp. 989-990.)

This synthesis was based on principled distinctions between the purposes of contract and tort law. Citing largely to *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 77-80, former Chief Justice Malcolm Lucas explained the differing purposes of tort and contract remedies thusly: "The traditional goal of contract remedies is compensation of the promisee for the loss resulting from the breach, not compulsion of the promisor to perform his promises. Therefore, "willful" breaches have not been distinguished from other breaches. [Citation.] The restrictions on contract remedies serve purposes not found in tort law. They protect the parties' freedom to bargain over special risks and they promote contract formation by limiting liability to the value of the promise. This encourages efficient breaches, resulting in increased production of goods and services at lower cost to society. [Citation.] Because of these overriding policy considerations, the California Supreme Court has proceeded with caution in carving out

exceptions to the traditional contract remedy restrictions. [Citations.]' ([Harris v. Atlantic Richfield Co., supra,] 14 Cal.App.4th at p. 77.) [¶] The Harris court set forth as reasons for denying tort recovery in contract breach cases (1) the different objectives underlying the remedies for tort and contract breach, (2) the importance of predictability in assuring commercial stability in contractual dealings, (3) the potential for converting every contract breach into a tort, with accompanying punitive damage recovery, and (4) the preference for legislative action in affording appropriate remedies. (Harris[v. Atlantic Richfield Co.], supra, 14 Cal.App.4th at pp. 81-82; see also Foley [v. Interactive Data Corp. (1988)] 47 Cal.3d [654], 683, 694, fn. 31, 696.)" (Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal.4th 85, 98.)

Plaintiff's negligence claim does not fall within the circumstances identified by the California Supreme Court which allow a contract based cause of action to be pursued as a tort claim. State Farm owed no contractual duty to plaintiff. Her negligence claim contains none of the elements identified in *Robinson Helicopter* and *Erlich*. Hence, plaintiff's negligence verdict and the ensuing judgment must be reversed.

We recognize that in *Murray v. State Farm Fire & Casualty Co.*, *supra*, 219
Cal.App.3d at page 66, footnote 5, the Court of Appeal stated in obiter dictum that there may be a situation where even if there was no coverage, potential liability could still exist because of the unreasonable delay in performing an investigation. In *Murray*, the Court of Appeal noted, "[T]he insurance company might be liable if it unreasonably delayed in performing an investigation of a claim before concluding there was no coverage and the insured suffered consequential loss as a result of the delay." (*Ibid.*) Further, in *Brizuela v. CalFarm Ins. Co.* (2004) 116 Cal.App.4th 578, 594, the Court of Appeal noted, again in dictum, an insurer might be liable for an implied covenant breach if, instead of investigating a non-covered claim, the insurance company embarked on a campaign to intimidate its insured into settling. (See *Progressive West Ins. Co. v. Superior Court, supra*, 135 Cal.App.4th at p. 280.) We need not discuss these holdings. None of the extreme circumstances identified is present here nor was the case litigated on these

theories. There are no elements of detrimental reliance as in *Murray* nor the extreme conduct discussed in *Brizuela*. Further, we note none of these cases discusses the effect of *Robinson Helicopter* or *Erlich*. The effect of *Robinson Helicopter* or *Erlich* was not before the Courts of Appeal in *Murray* and *Brizuela* and the aforementioned analysis arose solely in the context of obiter dictum.

[Parts III C and D are deleted from publication. See post at page 27 when publication is to resume.]

C. Plaintiff Has Not Shown A New Trial Right Based On Error In The Special Verdict Form Submitted To The Jury

Plaintiff contends she was entitled to a new trial as to her contract breach and implied covenant causes of action against State Farm because of error in the special verdict form submitted to the jury. Over plaintiff's objection, the jury was given a special verdict form that asked in part, "Do you find by a preponderance of the evidence that the Lisa Haley water event in May of 2000 was the predominant cause of the mold in Plaintiff's unit?" The jury answered that question, "No." Plaintiff moved for a new trial on grounds she had presented evidence of multiple instances of water intrusion in addition to the May 2000 remodeling mishap and the jury should have been permitted to consider all of that evidence.

We turn first to the standard of review on appeal. The Supreme Court has held that on appeal from the trial court, an order *denying* a new trial motion is subject to independent review of the entire record for prejudicial error. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872; *Ajaxo, Inc. v. E\*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 46-47; *Piscitelli v. Friedenerg* (2001) 87 Cal.App.4th 953, 969; *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 211; 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 146, p. 647.) It has also been held, however, "that any determination underlying any order is scrutinized under the test appropriate to such determination. (See, e.g., *People v. Waidla* (2000) 22 Cal.4th 690,

730; People v. Alvarez (1996) 14 Cal.4th 155, 188.)" (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 859.)

Plaintiff contends, "The correctness of a special verdict is reviewed as a matter of law, i.e., de novo review." We disagree. First, plaintiff cites cases in which two of the jury's special verdict findings were inconsistent with each other, a circumstance not present in this case. (City of San Diego v. D.R. Horton San Diego Holding Company, Inc. (2005) 126 Cal. App. 4th 668, 678; Mendoza v. Club Car, Inc. (2000) 81 Cal. App. 4th 287, 303; Trujillo v. North County Transit Dist. (1998) 63 Cal.App.4th 280, 285.) Second, there is decisional authority holding that an order to submit a particular question to a jury is reviewed for an abuse of discretion: "[U]nder section 625 of the Code of Civil Procedure, it [is] optional with the court to submit, or refuse to submit, particular questions of fact to the jury. The exercise of the power and the extent of its exercise are left to the discretion of the court, and error cannot be maintained without at least a clear showing of the abuse of such discretion . . . ." (Olmstead v. Dauphiny (1894) 104 Cal. 635, 641; accord, e.g., Perry v. Schwartz (1963) 219 Cal. App. 2d 825, 828 ["The giving of special interrogatories lies in the discretion of the court. [Citation.] The court's determination of the propriety of a special finding is not subject to review in the absence of a clear abuse of discretion. [Citation.]"]; Olson v. Arnett (1980) 113 Cal.App.3d 59, 67; Sloan v. Stearns (1955) 137 Cal. App. 2d 289, 302-303; House Grain Co. v. Finerman & Sons (1953) 116 Cal. App. 2d 485, 498; Mayfield v. Fidelity & Casualty Co. of New York (1936) 16 Cal. App. 2d 611, 628-629; see Heppler v. J.M. Peters Company, Inc. (1999) 73 Cal. App. 4th 1265, 1288.) We need not conclusively resolve the question as to the proper standard of review on appeal from the new trial denial order because, as discussed below, plaintiff has not met her burden to show error on appeal.

We agree with plaintiff that State Farm bore the burden *in the trial court* to show that her loss was excluded. The Supreme Court has described the causation analysis under both first party property and third party liability all-risk coverage as follows: "[O]nce the insured shows that an event falls within the scope of basic coverage under

the policy, the burden is on the insurer to prove a claim is specifically excluded. [Citations.] Moreover, exclusionary clauses are interpreted narrowly, whereas clauses identifying coverage are interpreted broadly. [Citation.]" (*Garvey v. State Farm Fire & Casualty Co., supra,* 48 Cal.3d at p. 406; accord, *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1071; *Aydin Corporation v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1185-1186; *Weil v. Federal Kemper Life Assurance Co.* (1994) 7 Cal.4th 125, 148; *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 437-438; *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 879-881.) The jury instruction on this point was consistent with that well-established rule. The jury instruction in this case stated: "State Farm claims that [plaintiff's] loss is not covered because it is specifically excluded under the policy. To succeed, State Farm must prove that [plaintiff's] loss arises out of a specific exclusion in the policy."

State Farm met its burden in this regard; it was undisputed that a loss due to mold was an excluded risk. However, plaintiff argued her damage was a covered risk because of an exception to the mold exclusion. In other words, plaintiff asserted her loss due to mold was a covered loss because, in the language of the policy, it was "caused by a peril which is not otherwise excluded." The jury was instructed as follows that *plaintiff* bore the burden to prove that her mold loss was caused by a covered peril: "[Plaintiff] claims that her mold damage is covered under an exception to specific coverage exclusion under the policy. To establish this coverage, [plaintiff] must prove that her mold loss is caused by a covered peril." Plaintiff has not raised any issue on appeal with respect to that instruction. Any issue that could have been raised has been waived. (*Tiernan v. Trustees of Cal. State University & Colleges, supra,* 33 Cal.3d at p. 216, fn. 4; *Johnston v. Board of Supervisors, supra,* 31 Cal.2d at p. 70. In any event, it is plaintiff's burden to show error *on appeal*. As the Court of Appeal held in *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712, "Error is never presumed. It is incumbent on the [appellant] to make it affirmatively appear that error was committed by the trial court. [Citations.]"

This is true even when, as here, the standard of review is independent review of the entire record. (Reyes v. Kosha (1998) 65 Cal. App. 4th 451, 466, fn. 6; see Kim v. Sumitomo Bank (1993) 17 Cal. App. 4th 974, 979; Eisenberg et al., Cal. Practice Guide: Civil Appeal & Writs (The Rutter Group 2005) ¶ 8:17.2, p. 8-6 (rev. #1, 2005).) As discussed above, proximate or predominate cause of loss is for a jury to consider when there is sufficient evidence to support the possibility that an insured's damages were caused by both included and excluded risks. (State Farm Fire & Cas. Co. v. Von der Lieth, supra, 54 Cal.3d at p. 1131; Garvey v. State Farm Fire & Casualty Co., supra, 48 Cal.3d at p. 412.) Here, the jury was instructed that when an insured's loss is caused by a combination of covered and excluded risks, "[T]he loss is covered only if the most important or predominant cause is a covered risk." In support of her argument the jury should have been given an opportunity to consider all evidence of potentially covered events, not just the May 2000 water incident, plaintiff points to evidence that mold was found in various locations throughout her home. However, plaintiff has not cited any evidence that a covered peril was the predominant cause of the mold found at any particular location. Plaintiff has not shown there was any substantial disputed evidence from which the jury could have concluded a covered event resulted in mold. Further, plaintiff has not demonstrated the covered event was the predominant cause of the mold in plaintiff's condominium unit. State Farm cites evidence the mold in the locations plaintiff identified did *not* derive from a covered cause. Absent a showing there was substantial disputed evidence from which the jury could have concluded a covered event other than the May 2000 incident was the predominant cause of plaintiff's loss, we cannot find the trial court abused its discretion in allowing the challenged special verdict question. Absent a showing of prejudicial error, plaintiff is not entitled to a new trial.

# D. Plaintiff's Claims Against Ms. Haley

## 1. Summary of analysis

Plaintiff contends she was entitled to a new trial as to damages against Ms. Haley for several reasons. As discussed above, an order denying a new trial motion is subject to independent review of the entire record for prejudicial error. (*City of Los Angeles v. Decker, supra,* 18 Cal.3d at p. 872; *Ajaxo, Inc. v. E\*Trade Group, Inc., supra,* 135 Cal.App.4th at pp. 46-47; *Piscitelli v. Friedenerg, supra,* 87 Cal.App.4th at p. 969; *Dominguez v. Pantalone, supra,* 212 Cal.App.3d at p. 211.) However, plaintiff has not shown that the trial court's ruling was in error.

2. Plaintiff was not entitled to a new trial as to Ms. Haley because the jury's findings are inconsistent

Plaintiff contends she is entitled to a new trial as to her negligence and nuisance causes of action. These claims were against plaintiff's upstairs neighbor, Ms. Haley. Plaintiff asserts the jury's findings in Ms. Haley's favor were inconsistent with its award of \$260,000 in negligence damages against State Farm. Plaintiff argues, "[T]he damages award arose, at least in part, from the May 2000 flood from [Ms.] Haley's unit." This is the entirety of plaintiff's argument on this point in her opening brief. We perceive no inconsistency. The jury found: State Farm negligently investigated plaintiff's insurance claim; Ms. Haley was not negligent "with regard to water intrusions into [p]laintiff's unit"; and plaintiff's free use of her property was not obstructed "so as to interfere with the comfortable enjoyment of her property[.]" We see no reason why the jury could not conclude: Ms. Haley was not negligent in the management of her property; Ms. Haley did not create a nuisance; but State Farm negligently mishandled the investigation of plaintiff's claim.

3. Plaintiff has not shown Ms. Haley was liable for nuisance as a matter of law

Plaintiff argues Ms. Haley was liable for nuisance as a matter of law. Plaintiff asserts: "There can be no question that [Ms.] Haley's and [her contractor's] acts and omissions damaged [plaintiff's] property. It is no defense for [Ms.] Haley that [her contractor] may have created the circumstances that led to the May 2000 water event. . . . [T]he owner of the property is still liable for the consequences under a nuisance theory. At a minimum, the May 2000 water event constituted an infringement on [plaintiff's] entitlement to quiet enjoyment of her property, and [plaintiff] was entitled to quiet enjoyment of her property, and [plaintiff] was entitled to a judgment notwithstanding the verdict or new trial against [Ms.] Haley." The Supreme Court has held that a private nuisance is a nontrespassory interference with the private use of one's land. (San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 937; Civ. Code, § 3479 ["Anything which is injurious to health . . . so as to interfere with the comfortable enjoyment of . . . property"].) Whether a plaintiff has shown such interference is a question of fact that turns on the particular circumstances of each case. (San Diego Gas & Electric Co. v. Superior Court, supra, 13 Cal.4th at pp. 938-939; Shamsian v. Atlantic Richfield Co. (2003) 107 Cal. App. 4th 967, 980; City of Berkeley v. Gordon (1968) 264 Cal.App.2d 461, 467.) Here, the jury was instructed: "A nuisance is any act or failure to act that is:  $[\P]$  1. injurious to health; or is  $[\P]$  2. an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Plaintiff's argument disregards evidence from which the jury could reasonably have concluded: plaintiff suffered only minimal damage as a result of the May 2000 leak from Ms. Haley's unit; the damage was repaired; and the May 2000 event was not the cause or was not the predominant cause of plaintiff's mold damage; Ms. Haley's actions were not

injurious to plaintiff's health; and whatever moisture leaked from Ms. Haley's unit was not a legal cause of plaintiff's injuries.

[The balance of the opinion is to be published.]

## IV. DISPOSITION

The judgment in favor of defendant, Lisa Haley, and against plaintiff, Magda Benavides, is affirmed. The judgment in favor of plaintiff and against defendant, State Farm General Insurance Company, is reversed. Defendants are to recover their costs on appeal from plaintiff.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P. J.

I concur:

KRIEGLER, J.

# MOSK, J., Concurring

## [The following is for publication]

I concur.

I agree that the judgment in favor of plaintiff and against defendant State Farm Insurance Company should be reversed. Plaintiff could not recover for negligence in investigating the insurance claim because "[n]egligence is not among the theories of recovery generally available against insurers. Delay or failure to pay policy benefits may be actionable as a breach of contract or bad faith, not negligence." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2005) § 11:205, p. 11-48.)

## [The remainder of this concurrence is not for publication]

I also agree as to the appeal on the claim against Haley. As to plaintiff's appeal with regard to State Farm Insurance Company, I am troubled with the trial court's special verdict form limiting the issues submitted to the jury to the May 2000 flood. This special verdict had the effect of being a partial nonsuit as to various claims, and it appeared inconsistent with earlier rulings by the trial court. Nevertheless, plaintiff had the opportunity to submit argument—written and oral—with respect to the special verdict form.

If plaintiff had the burden to submit evidence that a covered peril was the predominant cause of the mold, I agree that plaintiff has not met that burden. As noted by the majority, plaintiff has not raised any issue on appeal with respect to the instruction that she had the burden to prove that the mold loss was caused by a covered peril. (See *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183.)

Accordingly, there was no prejudicial error. Thus I concur in the judgment.

### MOSK, J.